Proskauer

newsletter

in this issue

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Equal Employment Opportunity Commission

EEOC Final Regulations on Reasonable Factors Other Than Age May Have Broad Impact on Employer Polices/Practices – April 3, 2012

The EEOC issued regulations identifying a non-exhaustive list of considerations that will be examined to determine whether an employer practices are based on a "reasonable factor other than age" for purposes of defending against disparate impact claims brought under the Age Discrimination in Employment Act. These new considerations mean that employers will be held to a high standard in implementing policies and practices that may have a disparate impact on employees aged forty and over.

EEOC Issues New Guidance on Criminal Background Checks – April 26, 2012

On April 25, 2012, the EEOC issued new guidance on criminal background checks, describing the circumstances under which use of arrest and conviction records in hiring may run afoul of Title VII of the Civil Rights Act of 1964 ("Title VII") under either a disparate treatment of disparate impact theory. It continues to endorse an employer's use of the factors set out in the *Green v. Missouri Pacific Railroad Company*, 523 F.2d 1158, 1160 (8th Cir. 1975), when making employment decisions based on conviction record, which include the nature of the offense, the time elapsed since the offense, and the nature of the job sought. However, the EEOC offered several best practice tips for employers to ensure compliance with Title VII: (i) eliminate policies that impose an absolute bar to employment based on any conviction; (ii) train hiring managers about appropriate use of an applicant's/employee's conviction history in hiring and promotion, and separation; (iii) tailor screening procedures to ensure that they are job related and consistent with business necessity; (iv) do not ask applicants for disclosure of convictions that are not job related and consistent with business necessity; and, (v) keep information about applicants' and employees' conviction history confidential.

EEOC: Second Circuit Issues Significant Rulings Regarding Internal Investigations and the *Faragher/Ellerth* Defense – May 14, 2012

In *Townsend v. Benjamin Enterprises, Inc.*, the Second Circuit recently held that (i) the participation clause of Title VII's anti-retaliation provision does not protect an employee who participates in an internal employer investigation that is not connected to any formal charge and (ii) the *Faragher/Ellerth* affirmative defense is not available to an employer if the harasser is the employer's proxy or alter ego. The holding is particularly notable

because it appears to permit an employer to fire an employee based on the employee's participation in an internal investigation—as long as the investigation is not connected to an EEOC charge. Nevertheless, employers should be mindful that this decision does not disturb other well-established authority on retaliation, including the United States Supreme Court 2009 holding in *Crawford v. Metropolitan Gov't. of Nashville* that employees who answer questions during internal company investigations are protected from retaliation under Title VII's "opposition clause" (prohibiting retaliation against anyone who "has opposed any practice made an unlawful employment practice by this subchapter.").

National Labor Relations Board

Micro Union Case Hits Federal Court Of Appeals – April 23, 2012

The Sixth Circuit is to review one of the NLRB's most decision cases in decades, *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (August 26, 2011), as the employer seeks to have the decision overturned. The Board in this case established the micro union standard, where the bargaining unit sought by a union will be given special deference if the employee grouping selected shares a community of interest. The significance of this rule is that an employer now may be faced with multiple bargaining units (e.g., by department or job classification or title) when the standard for seventy-seven years has been to look at the industry involved and the functional integration of the employees. Now, if an employer seeks to include additional employees in the bargaining unit, it must demonstrate the larger grouping shares an "overwhelming" community of interest. In the rule's short tenure, it has become apparent that the undefined new standard is (almost) impossible to reach.

NLRB Challenges Long-established Investigation Best Practice – August 9, 2012

The National Labor Relations Board recently challenged the long-standing practice by which employers have directed employees not to discuss internal investigations with other employees. Reversing the decision of an administrative law judge, the Board held: "Contrary to the judge, we find that the [employer's] generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights [to engage in concerted activity for mutual aid and protection]." While this decision leaves many open-ended questions, employers should continue to follow best practices with regard to internal investigations, including maintaining their confidentiality.

NLRB Upholds Termination For Facebook Posting, But Nails Employer For Unrelated Handbook Policy – October 3, 2012

In *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (September 28, 2012), the NLRB upheld an employer's discharge of a car salesman after the employee posted on Facebook a mocking comment about a vehicle that had crashed, finding the posting to be unprotected speech.

NLRB Developments Post-Election – What The Future May Hold In Labor Relations – November 19, 2012

Now that the November 2012 elections are over, the pressing issues facing the NLRB, as well as those advanced by the agency are pretty well known: (i) two Members (Griffin and

Block) have been challenged legally as improper recess appointments and litigation over their appointments will be decided in the coming months; (ii) the NLRB's effort to require all employers under its jurisdiction to post a notice informing employees of their rights to unionize continues but is currently tied-up in litigation; (iii) the new regulations over representation elections, variously called "quickie" or "ambush" elections, also have been stalled by litigation; (iv) the NLRB's decision altering the analysis for determining bargaining units continues to cause a wide impact and will be something to watch; (v) the NLRB will continue to scrutinize, and likely find violations, with employer policies concern internal investigations, social media, at-will provisions, courtesy, and off duty access.

Health Care Reform

DOL Begins Enforcing the ACA through Plan Audits – April 17, 2012

The DOL has begun issuing audit requests related to the various mandates under the Affordable Care Act. Plan sponsors and administrators are encouraged to maintain specific plan documentation dating back to September 23, 2010 in order to demonstrate compliance with the Act. In particular, detailed records of participation information and communications with participants about enrollment periods and coverage should be retained in a readily accessible fashion.

IRS Releases Guidance on Comparative Effectiveness Research Fee – May 3, 2012

On April 12, 2012, the IRS issued a proposed fee schedule for insurers and plan sponsors of group health plans to pay toward funding the Patient-Centered Outcome Researched Institute. The Institute and the corresponding fee were established by the Affordable Care Act to conduct research into the comparative effectiveness of various medical treatments and services. The fee applies to sponsors of self-insured plans as well to plans issued by insurance companies and is based on upon the average number of lives covered by the issuer. The amount payable will be $1 for each covered life for a 2012 policy or plan year, $2 for each covered life for a 2013 policy or plan year, and an increased amount each year thereafter based upon the percentage increase in the projected per capita amount of National Health Expenditures. The fee generally will apply to policy and plan years ending on or after October 1, 2012 and before October 1, 2019. The fee must be reported on IRS Form 720 and paid annually by July 31 of each year, commencing July 31, 2013.

Additional Guidance on the Summary of Benefits and Coverage – May 18, 2012

The Affordable Care Act requires group health plans and health insurers to provide a summary of benefits and coverage, starting with the first open enrollment or plan year beginning on or after September 23, 2012. The Departments of Labor, Health and Human Services and Treasury provided clarification of this requirement in the ninth in their series of answers to frequently asked questions on implementation issues associated with the Affordable Care Act.

IRS Releases Guidance on $2,500 Health FSA Contribution Limit – June 4, 2012

On May 30, 2012, the IRS issued guidance on the application of the Affordable Care Act's $2,500 limit (down from $5,000) on employee pre-tax contributions to health flexible spending arrangements. The new limit becomes effective for plan years beginning after December 31, 2012.

New York

New York's Highest Court Re-Affirms At-Will Employment Rule – May 16, 2012

The New York State Court of Appeals in *Sullivan v. Harnisch* refused to extend to compliance officers an exception to New York's employment-at-will doctrine. The plaintiff, Chief Compliance Officer in a hedge fund, argued that he was fired in retaliation for his internal inquiries into his superior's trading activities. In holding that the plaintiff did not have a right to continued employment, the Court noted that "the existence of federal regulation furnishes no reason to make state common law governing the employer-employee relationship more intrusive." However, while *Sullivan* does not create or expand an exception to the employment-at-will doctrine, compliance officers are not left without recourse. Employers in heavily regulated industries such as health care still should be cautious when terminating an employee who has raised a complaint about financial or other wrongdoing. Moreover, employees may still be able to assert claims under federal law regardless of whether the misconduct is reported internally or externally.

New York State Agencies Issue Regulations Regarding the Administration of Expenses and Executive Compensation of State-Supported Entities – June 26, 2012

On May 16, 2012, Governor Cuomo issued an executive order placing a limit on the funds that can be used for administrative expenses and executive compensation by entities, both for-profit and not-for-profit, that receive state funds or state-authorized payments to provide services. These regulations became effective on January 1, 2013.

New York State Agencies Issue Regulations Regarding the Administration of Expenses and Executive Compensation of State-Supported Entities – January 8, 2013

On May 16, 2012, Governor Cuomo issued an executive order placing a limit on the funds that can be used for administrative expenses and executive compensation by entities, both for-profit and not-for-profit, that receive state funds or state-authorized payments to provide services. These regulations are scheduled to become effective on April 1, 2013.

Governor Cuomo Signs Bill Expanding New York Permissible Wage Deductions – September 10, 2012

On September 7, 2012, Governor Cuomo signed legislation expanding the ability of employers to make employee wage deductions. Specifically, the new legislation allows employers to make deductions to recover pay advances, accidental overpayment of wages, deductions for purchases made at events sponsored by bona fide charitable organizations; discounted parking passes and mass transit vouchers; gym membership dues; cafeteria, vending machine and pharmacy purchases made at the employer's place of business; tuition, room and board and fees for educational institutions; day care expenses; and payments for housing provided at no more than market rates by nonprofit hospitals. The NYS Department of Labor is required to publish regulations concerning the specific implementation of this law. These regulations have not yet been issued.

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Proskauer has one of the leading health care industry practices in the world. We combine an intimate knowledge of the health care industry with the resources and depth of a global firm with lawyers in thirteen offices across the Americas and Europe. This unique blend of industry knowledge and legal skill has enabled us to become a trusted advisor to both well-established and emerging health care companies.

This newsletter is for clients and friends of our Health Care Group and reports on labor and employment legal issues pertinent to the health care industry.

If you have any questions regarding the matters discussed in this newsletter, please contact any of the lawyers listed below:

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